Filed 7/24/20 P. v. Velasquez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH VELASQUEZ, Defendant and Appellant.	F076039 (Super. Ct. No. VCF303884) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jessica C. Leal, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Joseph Velasquez stands convicted, following a jury trial, of various sex offenses arising from a sexual assault. On appeal, he contends the trial court erred by (1) admitting evidence of defendant's prior sexual misconduct, (2) failing to limit evidence of the victim's fresh complaint, and (3) imposing a prior prison term enhancement on each indeterminate term of imprisonment based on a single prior prison term. By way of supplemental briefing, defendant also contends his prior prison term enhancements should all be stricken in light of Senate Bill No. 136. We strike the prior prison term enhancements and order the abstracts of judgment amended to reflect this change. In all other respects, we affirm.

PROCEDURAL SUMMARY

On February 11, 2015, the Tulare County District Attorney filed an information charging defendant with forcible rape (Pen. Code, § 261, subd. (a)(2); count 1), two counts of sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)(A); counts 2 & 3), three counts of forcible oral copulation (former Pen. Code, § 288a, subd. (c)(2)(A), current Pen. Code, § 287, subd. (c)(2)(A); counts 4, 5 & 6), sodomy by force (Pen. Code, § 286, subd. (c)(2)(A); count 7), assault with intent to commit a sex offense during the commission of a burglary (Pen. Code, § 220, subd. (b); count 8), and first degree burglary (Pen. Code, § 459; count 9). The information also alleged that defendant committed each of the charged sex offenses during the commission of a residential burglary (Pen. Code, § 667.61, subds. (a), (c) & (d)(4)) and had served a prior prison term (Pen. Code, § 667.5, subd. (b)) for two stalking convictions (Pen. Code, § 646.9) in 2012 and 2013.

On April 27, 2017, the jury returned a guilty verdict on all charges. The trial court found true the allegation that defendant had served one prior prison term. After the jury was discharged, the court struck the verdict on count 5 on its own motion, finding that the evidence did not support a verdict on more than two separate counts of oral copulation.

The trial court sentenced defendant to a total of 156 years to life in prison as follows: on count 9, a determinate term of six years, plus a one-year prior prison term enhancement, both stayed pursuant to Penal Code section 654; on each of counts 1, 2, 3, 4, 6, and 7, a consecutive 25-year-to-life term, plus a one-year prior prison term enhancement; on count 8, life with the possibility of parole, plus a one-year prior prison term enhancement, both stayed pursuant to Penal Code section 654.[1]

FACTUAL SUMMARY

The Work Encounter

The victim testified that she worked at the public library. In June or July of 2014,[2] a man approached her at the library, asking for help in locating some items. She led him to the location of the items he requested. Once she took him there, he began repeatedly and deliberately bumping his hip into her hip and the lower part of her body as she tried to walk past. The man continued to ask her for items that were in sight. He gave her a bad feeling and she believed he was trying to keep her there. The victim did not

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[1] After reviewing the record, we concluded that both the indeterminate abstract of judgment and the amended indeterminate abstract of judgment incorrectly reflect that count 1 was stayed and that an extra prior prison term enhancement was imposed. According to the trial court's oral pronouncement of judgment, count 1 was not stayed. We also noted that the probation officer's recommendation, which the court stated it was following, did not recommend or calculate a stay of count 1.

We requested supplemental briefing from the parties to provide an opportunity to comment on the stay of count 1. In response, the superior court has filed a supplemental clerk's transcript containing a second amended abstract of judgment, filed in that court on July 15, 2020, correctly reflecting that count 1 was not stayed. The abstract does, however, still incorrectly reflect *eight* prior prison term enhancements for the *seven* indeterminate terms. In any event, all of these enhancements will be stricken, as will the enhancement attached to the determinate term (count 9) on the determinate abstract of judgment. We will order the abstracts amended to reflect that all of the prior prison term enhancements have been stricken (see *post*).

[2] All further dates refer to 2014 unless otherwise stated.

recognize defendant as that man, but in his interview with police, defendant admitted he met the victim at the library, asked for her help, and touched her buttocks (see *post*).

The Sexual Assault

On July 27, the victim went to church and returned home around 1:00 p.m. At about 5:30 p.m., while she was watching a baseball game on television and wearing a blue shirt, bra, yoga pants, and underwear, there was a knock on her door. She answered the door to find defendant. Defendant asked her for aspirin for his headache. He asked to come in to use the bathroom. She declined both requests. He asked her a partially intelligible question about what time some local place closed and he asked for the time, which she told him. After she answered his questions, she attempted to close the door. Before she was able to fully close the door, defendant jammed the door open with his foot and forced his way into her apartment.

Once it became clear to the victim that she could not keep defendant out of her apartment, she attempted to use her portable phone to call the police. As she did so, defendant entered the apartment, locked the door behind him, and approached her. Before she was able to dial 911, defendant grabbed the phone from her and threw it. He then advanced on her, grabbed her by the throat, and forced her against the coffee table. She told him, "No, no, go away, you don't belong here." Defendant responded that he was going to stay and he was going to hurt her. Defendant groped the victim's breasts and digitally penetrated her vagina. She resisted him, but he was eventually able to force her to the ground and remove both her clothing and his clothing. Defendant pinned the victim to the ground, forced her legs open, forced her to masturbate him, and penetrated her vagina with his penis. As she was pinned on the ground under defendant, he orally copulated her by licking and biting her genitals, and he bit her on the inner thighs and buttocks.

Defendant then pulled the victim up from the ground and forced her to orally copulate him. She testified that defendant made her orally copulate him only one time.

But when asked if she remembered telling detectives that defendant made her orally copulate him three times, she said "it was a sequence of events, so … it may have been three times, yes." Defendant asked her to "kiss his penis" and "suck [him]," and he tried to force his penis into her mouth. The oral copulation was making her "gag" and she told him she could not breathe when she was doing it. He repeatedly threatened that if she did not comply, he would "fuck [her] up." During the encounter, defendant hit her between six and 12 times in the ribs and stomach when she tried to resist him or call for help.

Defendant forcefully kissed the victim's mouth, neck, breasts, and thighs. At one point, when the victim "rolled over … to [try to] protect [herself]," defendant forced her face down, digitally penetrated her anus, then penetrated her anus with his penis.

The sexual assault lasted about 30 minutes. In that time, the victim observed that defendant was bald and had a variety of tattoos. He had a "K" tattooed on one shoulder, a "G" on the other shoulder, a Winnie the Pooh on the right side of his chest, and some script across his stomach. He also had a tattoo on the back of one shoulder, but she was unable to see it clearly.

After the sexual assault, defendant told the victim to stay lying face down on the floor and not to look at him. As he left, he told her, "Good girls don't tell anybody. They just go take showers." As soon as defendant left, the victim called 911 and got dressed. Police and firefighters arrived soon after and the victim was transported to the hospital. At the hospital, she was examined by a nurse who took samples and documented her injuries.

The Apprehension

The next day, on July 28, a retired military police officer (the retired MP) saw defendant's father chasing defendant near the Amtrak station in Hanford. The retired MP followed them in her vehicle while defendant's father grabbed defendant by the shirt. Defendant slipped out of the shirt and continued running. Defendant's father continued chasing. The retired MP continued to follow until she saw that defendant's father had

pinned defendant against a car. The retired MP intervened, asking what was going on. Defendant's father explained that defendant was his son and he was chasing defendant because he refused to go somewhere with him. As the retired MP continued to listen, defendant admitted he had gone into a woman's apartment in Tulare and assaulted her. The retired MP then asked an employee at a nearby restaurant to call the police.

Hanford Police Officer Gabriel Jimenez responded to the call and transported defendant to the Hanford Police Department. During the drive, defendant gave an unsolicited statement: "I'm sorry I raped that girl. I'm sorry I raped her."

The Interview

Tulare Police Officer Tony Espinosa questioned defendant at the Tulare Police Department the same day.[3] Defendant told Espinosa he met the victim at the library in June. He asked her for help finding books. As she was getting books for him, she backed into him and "placed her butt on his body." Defendant said he touched the victim's buttocks with his hand "maybe … three times." He said that the following day, as he waited for the bus across the street from the library, he saw the victim walking from her car to the library. Defendant also saw her walking to and from her car on several more occasions while he waited for the bus. Defendant said that several weeks before the sexual assault, while he was on the bus, he saw the victim's car in her apartment parking lot and noticed the victim walking toward her apartment.

Defendant explained that on July 27, the day of the assault, he drank alcohol and took medication for depression. He stole a bicycle from a church and rode to the victim's apartment. He arrived at her apartment around 5:30 p.m., went to her door, and knocked. He went to her door planning to have sex with her. When she answered the door, he asked her questions (those she later described) and he forced his way into her apartment.

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[3] Espinosa questioned defendant in two sessions. The recordings of both sessions were admitted and played for the jury.

He then forced her to engage in sex acts. He "penetrated" her vagina "with [his] hands." He took her clothes off and his clothes most of the way off. His pants got caught on his ankle monitor. He orally copulated her, bit her on the thigh and buttocks, and gave her a "hickey" on her thigh and/or buttocks. He then forced her to orally copulate him. He also "had sex with" her while she was on her back. Defendant digitally penetrated her anus, then penetrated her anus with his penis until he ejaculated as she faced away from him. Defendant did not take anything from her apartment before he left. He got on the stolen bike and went home.

The Identification

The day after the sexual assault, the victim identified defendant as her attacker from a photographic lineup. It took her only a few seconds to identify him.

Defendant's parole officer obtained the global positioning system (GPS) tracking information from defendant's ankle monitor for July 27. The GPS tracking information showed that defendant remained at the victim's apartment for five or more minutes on July 27.

At trial, the prosecution introduced DNA evidence. The analyst who performed the DNA analysis found that defendant could not be eliminated as a contributor to the sample taken from the victim's anus. The random match probability—i.e., the probability that a random person would match the DNA profile—was "approximately one in 18 sextillion African Americans, one in 410 quintillion Caucasians, and one in 100 quintillion Hispanics."

Prior Sexual Misconduct

At trial, the prosecution also introduced evidence of defendant's prior misconduct against a prior victim. The prior victim testified that in July of 2012, she worked at the YMCA. While she was on duty, defendant approached her and asked if he could come into the YMCA to get a drink of water. She allowed him to do so. Before moving past her desk, he told her that something was spilled on the racquetball court. She did not

know how he could have known there was a spill because he had not gone back to the racquetball court. She told him she would have maintenance look at the spill. Shortly after, defendant returned and told her that the computer in the game room was blinking and that she needed to look at it. She told him she would resolve the problem later, but he continued to insist that she help him. She walked into the computer room and bent over to unplug the computer. While she was bent over, defendant leaned into her and touched his erect penis against her "rear end." She asked defendant to leave, pushed him out of her way, and walked back to her desk to call the police.

Defendant refused to leave after the prior victim told him to leave several times. He then asked her for a job application. She agreed to give him the application so she could get his name and telephone number to give to the police. When she saw the name that defendant had written down, she connected the voice and the name to sexual phone calls she had been receiving for roughly a year from someone named Joey. In at least one of those calls, defendant stated his desire to engage in sex acts with her on the racquetball court. She again asked defendant to leave. When he saw her calling the police, he left.

DISCUSSION

I. Evidence of Defendant's Prior Sexual Misconduct

Defendant challenges the trial court's admission of evidence of his prior misconduct toward the prior victim under both Evidence Code section 1101[4]—which generally precludes the admission of evidence of prior misconduct—and section 1108—which provides an exception for prior sexual offenses. Specifically, defendant contends (1) section 1108 is unconstitutional, (2) the prior misconduct evidence was not properly admitted pursuant to either section 1101 or 1108, and (3) the prior misconduct evidence should have been excluded pursuant to section 352.

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[4] All further statutory references are to the Evidence Code unless otherwise stated.

The People respond that because defendant failed to object at trial to all but the section 352 issue, he has forfeited the section 1101 and 1108 admissibility issues by failing to raise specific objections below. Defendant counters that his section 352 objection was sufficient to preserve the claims. He is incorrect. (§ 353; *People v. Partida* (2005) 37 Cal.4th 428, 434 (*Partida*) [" ' "failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable' "]; see *People v. Megown* (2018) 28 Cal.App.5th 157, 169 [§ 352 objection at trial does not preserve analogous § 1109 issue].)[5]

Defendant maintains that if the section 1101 and 1108 claims were not preserved, defense counsel was ineffective for failing to object on proper grounds. To establish ineffective assistance of counsel based on counsel's failure to object, defendant must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217 (*Ledesma*).) To establish prejudice, defendant must make a showing "sufficient to undermine confidence in the outcome" that but for counsel's errors there is a reasonable probability that the result of the proceeding would have been different. (*Strickland*, at p. 694; *Ledesma*, at pp. 217–218.)

Thus, we address defendant's section 1101 and 1108 claims on the merits to determine whether defendant suffered ineffective assistance of counsel.

A. Background

In this case, the parties both filed a motion in limine addressing the prior misconduct evidence. The prosecutor moved to introduce evidence of two instances of

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[5] We note that defendant's due process challenge, a constitutional issue, raises a pure question of law that is not forfeited on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235.)

defendant's prior misconduct pursuant to both sections 1101 and 1108.[6] The prosecutor's motion made the following offer of proof regarding defendant's prior misconduct toward the prior victim:

> "[The prior victim] began receiving calls from the defendant at her place of employment, the YMCA …. She would answer the phone and defendant would tell her she had a 'big booty' and would tell her what he wanted to do to her. The defendant told her he saw her all the time at her place of employment, asked if she had a boyfriend and if she lived alone.
>
> "Defendant called her approximately 20 times a night and it took place over a one year period. She did report the incidents to her boss, but was not taken seriously.
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> "While at work, the defendant came in and asked her if one of the employees was working. He asked her for a drink of water and she let him in. Defendant also asked her for a job application, which she gave to him. The defendant attempted to lure her to an area where there were racquetball courts, but she did not go. The defendant told her that one of the computers was smoking; she believed him. She went to the computer and while she was checking it (it wasn't on) defendant approached her from behind, 'leaned' into her and stuck his erected penis against the back of her leg. She pushed the defendant back. She recognized the defendant's voice as the person that had been calling her. She told him to leave and contacted the police.
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> "She said that the defendant knew where she lived, knew when she was alone at work, knew what time she got off of work because he would ask her to meet him in the parking lot of her work when she got off. The defendant did fill out an application and put his name as 'Joey the fourth, Velasquez.' "

The motion stated that, based on that misconduct, defendant was charged with assault with intent to commit a sex offense, felony stalking, misdemeanor sexual battery, and simple battery. He pled guilty to one count of stalking and one count of simple battery.

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[6] Because the trial court excluded evidence of the second instance of prior misconduct pursuant to section 352, we address only the first.

In defendant's motion in limine, he moved to exclude the prior misconduct evidence pursuant to section 352, but he did not challenge its admission pursuant to section 1101 or 1108, or seek an evidentiary hearing. He stated that he anticipated the prosecution would call witnesses to testify about his prior acts of stalking and sexual assault. He then made the following representation about what the prior victim would say if called to testify:

> "[The prior victim] would testify that [defendant] repeatedly called her at work in 2012, and eventually used deception to get her alone where he thrust, fully clothed, into her behind."

The trial court admitted the prior misconduct evidence under both section 1101 and section 1108, explaining that there were "many similarities between" the prior misconduct evidence and the currently charged offenses. Among other things, in both instances, defendant used a ruse to accomplish the sexual assault, and both offenses involved a "sexual assault-type of stalking."

B. Legal Framework and Standards of Review

Section 1101 is the general rule that governs admissibility of character evidence, including evidence of prior misconduct. It provides that character evidence, including "specific instances of [a person's] conduct," is generally "inadmissible when offered to prove [that person's] conduct on a specified occasion" or "disposition to commit" a crime or other wrongful act. (§ 1101, subds. (a) & (b).) However, evidence of prior misconduct can be admitted under section 1101 "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act … did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (§ 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 & fn. 6, 403.)

Before the enactment of section 1108, evidence of a defendant's prior sexual offenses, like other prior misconduct evidence, was generally inadmissible under section 1101. (See former § 1101, subd. (a), as amended by Stats. 1986, ch. 1432, § 1.) But in 1995, the Legislature enacted section 1108 to expand the admissibility of this type of evidence in sex offense cases. (§ 1108, subd. (a) ["In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."]; *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) Section 1108 "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.)

For evidence of prior misconduct to be admissible under section 1108, (1) the defendant must currently be charged with a sexual offense, (2) the trial court must make a preliminary factual determination that the prior misconduct constitutes a "sexual offense" as defined by the statute, and (3) the evidence must not be otherwise inadmissible pursuant to section 352. (§ 1108, subd. (a); *People v. Cottone* (2013) 57 Cal.4th 269, 281 (*Cottone*).)

As defined by section 1108, and as relevant here, a "sexual offense" includes an assault with intent to commit a sexual offense (§ 1108, subd. (d)(1)(B); Pen. Code, § 220), a sexual battery (§ 1108, subd. (d)(1)(A); Pen. Code, § 243.4), "contact, without consent, between the genitals or anus of the defendant and any part of another person's body" (§ 1108, subd. (d)(1)(D)), or an attempt to engage in any of these acts (§ 1108, subd. (d)(1)(F)).[7] The trial court makes findings of preliminary fact to determine whether

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[7] Section 1108, subdivision (d)(1) provides: " 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by subdivision (b) or (c) of Section 236.1, Section 243.4,

the prior misconduct constitutes a "sexual offense" by a preponderance of the evidence. (§ 405; *Cottone, supra*, 57 Cal.4th at pp. 283, 285–286 ["when a defendant objects to the admission of [§] 1108 evidence on the ground that the conduct does not amount to a crime, the court reviews any preliminary fact necessary to that determination under [§] 405"]; see *Cottone*, at p. 289 [trial court's determination of a preliminary fact under § 405 is final and is not revisited by the jury].)

If the prior misconduct constitutes a "sexual offense," the trial court applies section 352 to balance the probative value of the prior misconduct evidence against the "probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352; see § 1101, subd. (a); § 1108, subd. (a); *Falsetta, supra*, 21 Cal.4th at p. 911.) Under section 1108, prior misconduct "evidence is presumed admissible and is to be excluded [under section 352] only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters." (*People v. Cordova* (2015) 62 Cal.4th 104, 132 (*Cordova*).)

We review the trial court's findings of preliminary fact for substantial evidence (*Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 647–648), and we review the court's decision not to exclude evidence under section 352, and also its ultimate decision

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261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6 of, or former Section 288a of, the Penal Code. [¶] (B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem. [¶] (C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person. [¶] (D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] (E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. [¶] (F) An attempt or conspiracy to engage in conduct described in this paragraph."

to admit prior sexual misconduct evidence under section 1108, for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10; *Cordova*, *supra*, 62 Cal.4th at p. 132.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

C. Analysis

i. Constitutionality of Section 1108

We first dispose of defendant's contention that admission of evidence under section 1108 violates the due process clause of the United States and California Constitutions. The California Supreme Court has repeatedly considered and rejected this argument. (E.g., *Falsetta*, *supra*, 21 Cal.4th at pp. 916–922; *People v. Merriman* (2014) 60 Cal.4th 1, 46–47; *People v. Loy* (2011) 52 Cal.4th 46, 60 (*Loy*).) We are bound to follow these cases. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

ii. Admission of Evidence under Section 1108

a. Sexual Offense

Defendant contends the trial court erred when it determined that the prior misconduct evidence constituted a "sexual offense" as defined by section 1108, subdivision (d)(1). Defendant asserts that the prior misconduct evidence did not support all the elements of either Penal Code section 243.4 or 220, the sexual offenses proposed by the prosecution to support the prior misconduct evidence, and thus the trial court erred in finding the conduct constituted a "sexual offense." Defendant argues that proof was lacking for certain elements of both offenses.

Sexual battery required the trial court to find the following elements: (1) the defendant touched the prior victim, (2) the touching was to an intimate part of the prior victim, (3) the touching was done against the prior victim's will, and (4) the touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. (Pen. Code, § 243.4, subd. (e)(1); see CALCRIM No. 938.)

Assault with intent to commit a sex offense required the trial court to find the following elements: (1) defendant did an act that by its nature would directly and probably result in the application of force to the prior victim; (2) defendant did that act willfully; (3) when defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to the prior victim; (4) when defendant acted, he had the present ability to apply force to the prior victim; and (5) when defendant acted, he intended to commit mayhem, rape, sodomy, oral copulation, or any violation of Penal Code Section 264.1, 288, or 289. (Pen. Code, § 220; see CALCRIM No. 890.)

1. Touching

Defendant contends the sexual battery statute suggests that no "touching" occurs if *both* parties are clothed. (Pen. Code, § 243.4, subd. (e)(2).) Thus, he implicitly argues the statute requires that someone's skin be touched. He is incorrect.

Penal Code section 243.4, subdivision (e)(2) states that " 'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." The statute, however, says nothing about contact with the skin of either person. Clearly, the Legislature knows how to require contact with skin when it wants to. And when it wants to, it says so, as it did in a related statute, Penal Code section 243.4, subdivision (f), which defines "touches" for *felony* sexual battery[8] as "physical contact *with the skin* of another person whether accomplished directly or through the clothing of the person

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[8] Penal Code section 243.4, subdivisions (a) through (d) are "wobblers," punishable as misdemeanors or felonies. However, many courts refer to those sections as "felony sexual battery" to differentiate from Penal Code section 243.4, subdivision (e), which can only be punished as a misdemeanor. (See e.g., *People v. Ortega* (2015) 240 Cal.App.4th 956, 966, 968 [describing an offense under Pen. Code, § 243.4, subd. (e) as "misdemeanor sexual battery"]; *People v. Superior Court* (*Feinstein*) (1994) 29 Cal.App.4th 323, 329 [describing an offense under Pen. Code, § 243.4, subd. (a) as "felony sexual battery"].) For the sake of clarity, we do the same.

committing the offense." (Italics added.) Here, the Legislature chose not to require any contact with skin for *misdemeanor* sexual battery under Penal Code section 243.4, subdivision (e)(2). (See CALCRIM No. 938 ["*Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing."].)

Not surprisingly, courts have declined to insert a requirement for contact with skin into the misdemeanor sexual battery statute, recognizing that the Legislature required none. (See *People v. Ortega*, *supra*, 240 Cal.App.4th at p. 966 ["The touching element of misdemeanor battery … is different, as contact with the victim's skin is not required but may occur through clothing. (§ 243.4, subd. (e)(2).)"]; *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [" 'touches' " does not require actual contact with skin for conviction of misdemeanor sexual battery]; *People v. Dayan*, at p. 717 [jury instructions for misdemeanor sexual battery should "exclude any requirement of skin contact"].) Inserting elements into statutes is not our function; "[i]t is an elementary principle that the judicial function is simply to ascertain and declare what is in the terms and substance of a statute, not to insert what has been omitted or omit what has been inserted." (*People v. Sharp* (2003) 112 Cal.App.4th 1336, 1342; *People v. Sy* (2014) 223 Cal.App.4th 44, 61 [" ' "[t]he judiciary ordinarily has no power to insert in a statute an element the Legislature has omitted" ' "].)

The contact between defendant and the victim was sufficient to satisfy Penal Code section 243.4, subdivision (e)(2).

2. Intimate Part

Defendant next argues that the "intimate part" element of sexual battery was unsupported because there was no evidence he touched the prior victim's *buttocks*, rather than the back of her leg. (See Pen. Code, § 243.4, subd. (g)(1) [the buttocks are intimate parts].) This preliminary fact, however, was conceded by defendant in his motion in limine, where he represented that the prior victim "would testify that [he] repeatedly

called her at work in 2012, and eventually used deception to get her alone where he *thrust, fully clothed, into her behind*." (Italics added.) In this context, "behind" commonly means "buttocks." (See Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/behind> [as of July 24, 2020].)

Furthermore, even if defendant had not conceded the preliminary fact that he thrust against the prior victim's buttocks, the trial court had additional facts before it that supported that conclusion. In the prosecutor's motion in limine, the prosecutor outlined defendant's sexual calls to the prior victim in the preceding year, including defendant's statements that she had a "big booty" and his explanations of the sexual acts he wanted to perform upon her. The prosecutor also stated in the motion that when defendant thrust into the prior victim, he had an erection. Defendant did not challenge the prosecutor's proffer or seek an evidentiary hearing. From that proffer, the trial court could reasonably have concluded that defendant at least attempted to thrust his pelvis against the prior victim's buttocks, rather than her leg. Substantial evidence supported the trial court's finding that the "intimate part" element of sexual battery was satisfied.

Moreover, we note that even if the evidence had been inadequate to support a finding that defendant touched or attempted to touch the prior victim's buttocks—and therefore defendant had not committed sexual battery, but merely battery—the evidence would still have constituted a "sexual offense." As noted, a "sexual offense" under section 1108 can be a crime listed in the statute, but it can also be some other crime that involved, for example, "contact, without consent, between the genitals … of the defendant and any part of another person's body." (§ 1108, subd. (d)(1)(D).) If defendant only touched the prior victim's leg, thereby committing only a battery rather than a sexual battery, that conduct would still have constituted a "sexual offense" because

he touched *his* genitals against a part of the prior victim's body. (§ 1108, subd. (d)(1)(D); see *People v. Lopez* (2007) 156 Cal.App.4th 1291, 1296–1298.)[9]

3. Intent and Sexual Gratification

Lastly, defendant argues that as to both the "intent" element of assault with intent to commit a sex offense and the "sexual gratification" element of sexual battery, his "intent [was] at best ambiguous" because "the contact may have been an inadvertent result of [the prior victim's] backside being extended into [his] space."

As noted, defendant conceded that the prior victim "would testify that [he] repeatedly called her at work in 2012, and eventually used deception to get her alone where he thrust, fully clothed, into her behind." The prosecutor represented that the calls were sexual in nature; defendant told the prior victim she had a "big booty" and he wanted to perform sex acts upon her, and he asked her whether she had a boyfriend and if she lived alone. On the date of the assault, defendant attempted to isolate the prior victim by luring her away from her desk to the racquetball court and then to the computer room. When he succeeded in luring her to the computer room, he thrust his erect penis against either her buttocks or the back of her leg. She then pushed defendant away from her and told him to leave. He refused to leave until she called the police. Defendant never attempted to retract his concession that he thrust into the prior victim, and he never objected to the prosecution's proffer.

These facts provided substantial evidence that defendant touched the prior victim for purposes of sexual gratification because he had an erection when he thrust his pelvis against her and because his conduct was consistent with the sexual statements that he

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9 Defendant argues that even if the elements of a "sexual offense" were met, it was unfair to admit the prior misconduct evidence because he pled guilty to battery, not sexual battery. The fact that defendant was charged with or pled guilty to a nonsexual offense in a prior proceeding was irrelevant for purposes of admitting the underlying evidence of a prior sexual offense under section 1108. (*People v. Lopez*, *supra*, 156 Cal.App.4th at pp. 1298–1299.)

made over the preceding year regarding her buttocks and his desire to have sex with her. The facts also provided substantial evidence that defendant intended to commit a sex offense against the prior victim because he expressed an intent to have sex with her and attempted to lure her to two different secluded locations using false pretenses. His use of a ruse to isolate her, his waiting until she bent over to sexually contact her, and his refusal to leave until the police were called were all consistent with an attempt to commit a sex offense.

4. Conclusion

In sum, there was sufficient evidence presented at the in limine stage for the trial court to have reasonably concluded defendant committed assault with intent to commit a sexual offense and committed (or at least attempted to commit) a sexual battery. Substantial evidence supported the court's finding of preliminary fact that the prior misconduct constituted a "sexual offense" under section 1108.

b. Section 352

Defendant also contends the trial court should have excluded the prior misconduct evidence under section 352. He raises four reasons.

First, defendant argues the prior misconduct evidence was not probative of his disposition to commit the charged offenses because the prior offenses were not similar to the charged offenses. We disagree. The prior misconduct evidence was very probative of defendant's propensity to commit the charged offenses because it was a prior sexual offense (*Falsetta*, *supra*, 21 Cal.4th at p. 912) and because it was similar to the charged offenses.[10] In both instances, defendant learned of the victims' places of work and residences, he approached both and inappropriately touched them at their places of work,

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10 We note that prior sexual offenses need not be similar to charged offenses to be admitted pursuant to section 1108. (*Cordova*, *supra*, 62 Cal.4th. at p. 133.) However, similarity is relevant to a trial court in exercising its discretion pursuant to section 352. (*Cordova*, at p. 133.)

he utilized various ruses to accomplish the offenses, and he refused to leave after having been asked repeatedly to do so. Based on a comparison of the prior misconduct and the charged offenses, the trial court reasonably concluded that "many similarities" existed.

Second, defendant argues the prior misconduct evidence was not probative of his intent in the charged offenses because the prior misconduct was markedly less severe than the charged offenses and involved an "accidental bumping while [the prior victim] bent over in front of him." Again, we disagree. As previously discussed, there was good reason for the trial court to conclude defendant's misconduct toward the prior victim was not an accidental touching. More to the point, because the prior misconduct was quite similar to the charged offense, it was probative not only of intent, but also of plan and identity.[11] Defendant's plea of not guilty to all of the charged offenses placed all of the elements of each offense at issue (*People v. Steele* (2002) 27 Cal.4th 1230, 1243), including whether defendant formed the intent to commit a sex crime against the victim before he entered her home, whether the questions he asked her at her door were part of a common scheme or plan, and whether he was the person who inappropriately touched her at the library. The fact that defendant did not rape the prior victim did not make the prior misconduct evidence any less probative of those issues.

Third, defendant asserts that the prior misconduct evidence was prejudicial because it was less severe than the charged offenses, and because the jury was not told that he suffered a conviction related to that incident, making it likely that the jury punished him for the prior misconduct in addition to the charged offenses. That argument finds no purchase. As defendant acknowledges, quoting *People v. Nguyen* (2010) 184 Cal.App.4th 1096 at page 1117, admission of prior misconduct evidence is prejudicial where that " 'evidence is stronger and more inflammatory than evidence of the defendant's charged acts ….' " In light of defendant's

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[11] Although we declined to determine whether the evidence was admissible under section 1101, we note that it was probative for many of the purposes articulated in section 1101, subdivision (b).

reliance on *Nguyen*, it is unclear why he believes admission of the prior misconduct evidence was unfairly prejudicial when it was *weaker* and *less severe* than the charged offenses. In any event, defendant did not suffer unfair prejudice because of the strength or weakness of the prior misconduct evidence, which was less egregious than the charged offenses. The prior misconduct evidence was not likely to either inflame the passion of the jury or bolster otherwise weak charges. Along that line, it is unlikely that the jury sought to punish defendant for the crimes committed against the prior victim. The crimes against the victim were far more egregious than the crimes against the prior victim. Moreover, the jury heard from defendant's parole officer that defendant was required to wear an ankle monitor. It is therefore unlikely that the jury drew the conclusion that defendant had not been punished for the prior misconduct. Further, the jury instructions made clear that defendant was not currently charged with any crimes against the prior victim and that evidence of those prior crimes was admitted only to help the jury determine defendant's guilt with respect to the crimes against the victim. (See CALCRIM No. 375 & former No. 1191, current 1191A.)

Lastly, defendant argues the admission of the prior misconduct evidence was prejudicial in that it likely confused the jurors by requiring "yet more legal instruction [for them] to decipher." We reject this argument also. The prior victim's testimony was brief, and the trial court's instructions to the jury regarding the prior misconduct correctly explained the purpose of that evidence. We presume that the jury understood and followed the instructions given by the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Boyette* (2002) 29 Cal.4th 381, 436.)

We conclude the trial court did not abuse its discretion in deciding not to exclude the prior misconduct evidence under section 352.

iii. Admission of Evidence under Section 1101

Defendant also contends the trial court erred in admitting the prior misconduct evidence pursuant to section 1101 because the court failed to properly examine the

similarities between the prior misconduct and the current offenses, and, if it had, it would have found those similarities insufficient to allow admission for any purpose.

We need not address defendant's section 1101 argument because the prior misconduct evidence was properly admitted under section 1108. As noted above, in enacting section 1108, the Legislature decided that evidence of prior sex offenses is so uniquely probative of propensity to commit sex crimes that it is presumed admissible *without* consideration of the similarity requirements of section 1101, subdivision (b). (*Loy*, *supra*, 52 Cal.4th at p. 63.) Because the challenged evidence was appropriately admitted pursuant to section 1108, which permitted the jury to consider the evidence for any relevant purpose, no harm resulted from the jury's consideration of the prior misconduct for any of the purposes articulated in section 1101, subdivision (b). (*Loy*, at p. 63.)

iv. Prejudice

We have found no error in the admission of the prior misconduct evidence, and therefore we also find no prejudice to defendant arising from defense counsel's failure to object to its admission. As a result, defendant's claim that defense counsel was ineffective for failing to object to the evidence on proper grounds fails. (*Strickland*, *supra*, 466 U.S. at p. 697; *People v. Hester* (2000) 22 Cal.4th 290, 296–297 [on review, we can adjudicate an ineffective assistance claim solely on the issue of prejudice without determining the reasonableness of counsel's performance].)

But even if the admission of the prior misconduct evidence was error, the error was harmless in light of the overwhelming evidence against defendant. The erroneous admission of evidence requires reversal only if we determine it was prejudicial. In general, "the application of ordinary rules of evidence … does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v.*] *Watson* [(1956)] 46 Cal.2d [818] at page 836." (*People v. Marks* (2003) 31 Cal.4th 197, 227.) However, if admission of the evidence amounts to federal

constitutional error, as defendant claims it did here, we apply the standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) that requires reversal unless we conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, at p. 24; *Partida, supra*, 37 Cal.4th 428, 439.) " 'To say that an error did not contribute to the ensuing verdict is … to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86 (*Neal*).) In other words, if we conclude beyond a reasonable doubt that, in light of the overwhelming evidence, the jury's verdict would have been the same had the improper evidence been excluded, the error was harmless beyond a reasonable doubt. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 152 (*Eubanks*).)

Defendant contends the admission of the prior misconduct evidence denied him a fair trial because, without that evidence, the jury may not have convicted on the counts that required vaginal penetration, the burglary count, and at least one count of oral copulation. He characterizes the evidence in support of those charges as "weak." We disagree. The uncontroverted and properly admitted evidence against defendant was overwhelming as to *all* counts. Defendant himself confessed that he intended to have sex with the victim when he knocked on her door, and then he forced his way into her apartment, manually penetrated her vagina, repeatedly struck her, orally copulated her, forced her to orally copulate him, raped her, digitally penetrated her anus, and sodomized her. At trial, the victim testified that defendant forced his way into her apartment, groped her breasts, digitally penetrated her vagina, repeatedly struck her, forced her to masturbate him, raped her, orally copulated her, forced her to orally copulate him, digitally penetrated her anus, and sodomized her. In addition, there was evidence of the victim's physical trauma and defendant's recovered DNA. We are convinced beyond a reasonable doubt that any error in admitting the prior misconduct evidence had no effect on the verdicts, which were overwhelmingly supported by uncontroverted and properly

admitted evidence. Thus, defendant did not suffer prejudice from the admission of the prior misconduct evidence and any error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836 (*Watson*); *Chapman*, *supra*, 386 U.S. at p. 24; see *Neal*, *supra*, 31 Cal.4th at p. 86; *Eubanks*, *supra*, 53 Cal.4th at p. 152.)

II. Evidence of the Victim's Fresh Complaint

Defendant contends the trial court violated the fresh complaint doctrine when it admitted testimony of statements the victim made to officers about the sexual assault, especially her statement to Espinosa that defendant orally copulated her "approximately three times." Defendant argues that the improper admission of these hearsay statements rendered the trial fundamentally unfair and denied him due process. Again, we conclude any error was harmless.

A. Background

Before trial, the prosecutor moved in limine to admit the victim's statements to the officers as fresh complaint evidence. The prosecutor argued the evidence that "the victim reported the rape immediately after her attack" should be admitted to "corroborate her … testimony" under the fresh complaint doctrine. The prosecutor further argued that if defendant tried to impeach the victim's testimony, the statements to the officers would be admissible as prior consistent statements under section 1236. The trial court permitted the evidence over the objection of defense counsel.

At trial, three officers, including Espinosa, testified that the victim reported the sexual assault. Two of those officers responded to the 911 call at her home. Both of them testified the victim was distraught, scared, and crying. One of them, Detective DeHaro, testified to significantly more detail of the assault itself, stating that the victim told him defendant used a ruse to gain entry to her home, took the phone from her when she tried to call 911, and repeatedly punched her. DeHaro also testified about the details of several of the sex offenses. The third officer, Espinosa, testified that he interviewed

the victim at the hospital. He described her demeanor, and explained that she told him defendant sodomized her and also orally copulated her "approximately three times."

Defense counsel immediately objected on hearsay grounds, but the trial court overruled the objection, citing the "rulings on the motions in limine."

B. Legal Framework and Standard of Review

"Hearsay is an out-of-court statement that is offered for the truth of the matter asserted, and is generally inadmissible." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108, citing § 1200.) But under the fresh complaint doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749–750.) The evidence is not admissible for the hearsay purpose of proving "the truth of the content of the victim's statement but, rather, simply to show that a … complaint was made." (*Id*. at p. 755.) The jury may consider the evidence "for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime." (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522.)

We review the trial court's admission of evidence for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) "When the court abuses its discretion in admitting hearsay statements, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statements been excluded." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1293; *Watson*, *supra*, 46 Cal.2d at p. 836.) If the admission of hearsay evidence amounts to federal constitutional error, we apply the *Chapman* standard. (*Chapman*, *supra*, 386 U.S. at p. 24; *Partida*, *supra*, 37 Cal.4th 428, 439.)

C. Analysis

The testimony of both DeHaro and Espinosa included more details than the fresh complaint doctrine allowed. Rather than merely describing the fact and nature of the victim's complaint and the circumstances surrounding it, the officers described some of the details of the sexual assault itself. For example, Espinosa testified the victim reported that defendant orally copulated her "approximately three times." This was an abuse of discretion.

Defendant contends this error, especially admission of Espinosa's oral copulation testimony, denied him due process because the victim's testimony regarding the number of oral copulations was weak and the prosecutor incorrectly argued that defendant made, rather than asked, the victim to kiss his penis (the suggested basis of one of the oral copulation counts). Defendant urges us to apply the *Chapman* standard of harmless error. (*Chapman*, *supra*, 386 U.S. at p. 24.)

The People respond that the *Watson* standard applies (*Watson*, *supra*, 46 Cal.2d at p. 836), and any error was harmless because much of the officers' testimony was cumulative of other properly admitted evidence, and because Espinosa's oral copulation testimony was properly admitted under section 1235 as the victim's prior inconsistent statement.

We agree with the People that most of the officers' testimony regarding the victim's statements about the sex offenses was cumulative of other uncontroverted and properly admitted evidence—both defendant's confession and the victim's testimony described defendant's sex offenses against the victim. However, Espinosa's testimony that defendant orally copulated the victim three times was *not* cumulative of other evidence. Thus, it was Espinosa's oral copulation testimony that potentially prejudiced defendant, as the parties recognize.

The People argue that Espinosa's testimony was properly admitted as a prior inconsistent statement, but we need not address this issue because we conclude any error

in the admission of the hearsay statements was harmless beyond a reasonable doubt. Uncontroverted and properly admitted evidence overwhelmingly supported two counts of forcible oral copulation: the victim's testimony and defendant's confession established that defendant forced the victim to orally copulate him *and* he orally copulated her. Moreover, as we have explained, uncontroverted and properly admitted evidence overwhelmingly supported *all* the counts. The officers' hearsay statements were insignificant in light of this overwhelming evidence, and we are confident beyond a reasonable doubt that the erroneous admission of those statements had no effect on the verdicts, including the oral copulation verdicts. As a result, any error in the admission of the hearsay statements was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24; see *Neal*, *supra*, 31 Cal.4th at p. 86; *Eubanks*, *supra*, 53 Cal.4th at p. 152.)

III. Prior Prison Term Enhancements

In supplemental briefing, defendant asserts, and the People concede, that defendant's eight one-year prior prison term enhancements imposed pursuant to Penal Code section 667.5, subdivision (b) should be stricken. We agree.

Effective January 1, 2020, Senate Bill No. 136 (Stats. 2019, ch. 590, § 1) amended Penal Code section 667.5, subdivision (b) to limit prior prison term enhancements to only prior terms that were served for sexually violent offenses as defined by Welfare and Institutions Code section 6600, subdivision (b). (Pen. Code, § 667.5, subd. (b).) Defendant's eight enhancements were all based on a single prior prison term served for two stalking convictions. Because defendant's prior prison term was not served for a sexually violent offense, all eight Penal Code section 667.5, subdivision (b) enhancements must be stricken.[12]

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[12] Defendant's claim that those enhancements should not have been imposed on each count is now moot.

DISPOSITION

The eight prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) are stricken. The trial court is directed to prepare amended abstracts of judgment removing the prior prison term enhancements from all counts. Specifically, the determinate abstract of judgment should reflect a stayed upper term of six years (count 9) and no prior prison term enhancement; the indeterminate abstract of judgment should reflect six 25-year-to-life terms (counts 1, 2, 3, 4, 6 & 7), a stayed term of life with the possibility of parole (count 8), and no prior prison term enhancements. The court shall forward copies of both the determinate and indeterminate abstracts of judgment to the appropriate entities. As so modified, the judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

FRANSON, J.

PEÑA, J.